THE NEW PHILOSOPHIES OF LAW.

THERE is a visible tendency at the moment to subject this country to an alien philosophy of law. It is openly asserted by politicians and philosophers that the development of the common law is not keeping pace with modern thought, and that the common lawyer has too long neglected those higher conceptions which a modern philosophy of the German socialists alone unfolds. It is the validity of this argument which it is incumbent on us to examine before we give our approval to the kind of philosophy now proposed for our adoption. Many of us are apt to think that a technical subject is beyond our comprehension if it is couched in unfamiliar language peculiar to the subject, or else we take it for granted that because of its obscurity an argument is necessarily profound. There is of course a scientific terminology and a language peculiar to philosophy. Both may be used to advocate unsound as well as sound principles. That the philosophy proposed to us is inadequate and unfitted for our domestic consumption is the single proposition advanced in this paper. Ours is the greatest of republics, with an already long history and an unlimited future. The final philosophy of the law of this great country should find its inspiration here, and not in alien civilizations. The worst that could happen to this country would be that it should lose its firm grasp on the principles which have made it what it is. Our present law is in its essence incomparable and inimitable.

Before considering what is intended by a philosophy of law, let us for a moment consider what is meant by philosophy. Perhaps no other cult is more variously defined by the aristocracy of scholars than philosophy; so true is this that the very latest definition of philosophy proceeds by negation or exclusion, or by demonstrating what philosophy is not, rather than what it is. With English-speaking men philosophy retains the Aristotelian meaning of science in general. In other words, to English-speaking races philosophy is ἐπιστημὴ ἐπιστημῶν, or the science of sciences; it is a synthesis of all general doctrines into a universal

doctrine. If we regard science as the systematization of a knowledge of the order of phenomena, then philosophy is the systematization of the conceptions furnished by the philosophical sciences. The German's conception of philosophy differs from that indicated. To him philosophy means a particular transcendental view both of the object of study and of the source of an empirical science, although his philosophy may have the same object and content as an empirical science, provided the study of phenomena is not empirical. The German definition may be the more comprehensive, but just as the conception of the scope of philosophy differs from the Englishman's, so the German's conception of a philosophy of law differs from that of the English or the American lawyer, who regard philosophy as the science of principles furnished by the empirical sciences.

It is doubtless true, as Kant said, that there cannot be two philosophies founded upon principles, as one only can be true. In so far as the content or principles of philosophy are concerned, this is probably an accurate statement. But this statement needs to be supplemented by another, that up to this moment there is no perfect or complete philosophy of all disciplines. We have philosophies of different disciplines or sciences. Then we have philosophies labeled Greek, or a philosophy doubtless influenced by Greek accidents, such as aristocracy and slavery; and we have English, Scottish, Italian, German, and French philosophies, each with its own peculiar mental attitudes, characteristics or national tendencies, however uniform the method and dialectic employed may be. Each makes claims to superiority or universality. As Kant pointed out, each new philosophy must claim to supersede the others or it has no justification. There is a fashion in philosophy just as there is in lesser and more mundane things. The same idea or concept in different heads, German or English, travels very different ways and reaches regions that have little in common.

When the final philosophy arrives it will merge all these national philosophies, with their local accidents and idiosyncrasies, in some great synthesis or harmony which will sound on unchanged forever. But the one final, all-embracing, indisputable synthetic philosophy has not yet come into this world of ours. Before it does come, the contention between the rationalists and the re-

ligious philosophers over the final cause must be settled, as the positivists have given up the ontological quest.

While some positivists do not recognize separate philosophies of empirical sciences, most thinkers do recognize that there is a philosophy for each science. The philosophy of law is the discipline concerned with the doctrines, principles, and conceptions furnished by the science of law. Now it is indubitable that the science of the law of Germany is not the science of the law of English-speaking countries. Law is one thing in Germany, and another in the countries subject to the common law. Therefore a philosophy of the law of England and America is dealing with different juristic phenomena from a philosophy of the law of Germany. If we concede the identities of the two sciences, the philosophy of law would be the same in Germany and in England or America. But as stated, the sciences are not identical. In England and America the science of law is concerned with the juristic phenomena known as positive laws only, or law in position. This was laid down by such thinkers as Hobbes, Bentham, Austin, and Maine, who certainly are comparable to most Germans of the schools. Statute law is positive law, and so is our common law. A judge in common-law countries must decide in accordance with positive law, and when this is defective he must supplement it in accordance with positive law. In Germany this is not true, as the distinction between legislation and juristic application is not kept clear in that country. A different conception of law and of the function and power of a judge is entertained in Germany. The science of law in a particular state is necessarily concerned with those objective phenomena recognized as laws in that state.

In Germany the science of law is concerned with laws not positive, as well as with positive laws, and therefore the legal scientists of Germany go far in search of the origin of law. Their method involves the discussion of origins, then of ethical norms of action, delimitation of interests, economic content of law, and lastly "social justice." Leibnitz, following Plato, long ago, attempted a series of definitions of justice, making justice coextensive with the whole sphere of human duties. But he left "justice" still very obscure, and the philosophy of social justice has made it no clearer. Lasalle well stated that economic forces are abstractions.

But all these concepts mentioned are abstractions, and in England or America are conceived to belong to some other science than law, or else to the philosophy of law. The distinction between a science and a philosophy is that a science assumes certain things as working hypotheses which philosophy submits to a critical analysis. In common-law countries the science of law is concerned only with the objective juristic phenomena known as positive laws, or that law authenticated or enforced by government. There are no working hypotheses in American or English law. Positive law in those countries always connotes political or organic enforcement or authority. If a rule of action is not recognized or enforced by government, it is in England and America not embraced in the science of law. This is generally held by common lawyers, who for a very long period have rarely confused positive law, or the law of the lawyers, with other analogous rules of being or action. In England and America the science of law is confined wholly to the systematic arrangement and knowledge of positive laws, or, in other words, is regarded as an empirical or practical science and is distinguished from a philosophy of law by its empirical content. The science of law ought also to be distinguished from jurisprudence, which is a purely theoretical discipline. But the term "jurisprudence" is so inexact as to indicate very different disciplines. It is rarely used with precision.

Having roughly outlined the essential difference between a science of law and a philosophy of law, let us examine for a moment the contents of the science of the common law. Any general work on the science of law must aim to furnish some systematic arrangement and knowledge of the laws of a country where that law is in operation. Blackstone and Kent, the leading writers on the respective common laws of England and America, to all intent and purpose, furnish a science of law. They arranged their institutes with reference to a scheme or analysis adopted by Hale. Their arrangement or analysis is not scientific, but it is concrete and adapted to law-men. None of the influential codes of the world have been arranged on any scientific plan. The Institutes of Narada of Hindu law, the Twelve Tables, the Edicts of the Prætors, the Codes of Hermogenian, Theodosius and Justinian, each and all lack scientific disposition, and adhere to no strictly logical scheme; but they do not want system such as it is, and the system

chosen had reference to the needs of lawyers and not to the requirements of logicians.

Blackstone's main analysis or arrangement, rights of persons, rights of things (*jura personarum, jura rerum*), so harshly criticised by Austin, has found its ablest defender, I am happy to say, in the "Introduction to Sandar's Institutes of Justinian," by Dr. Hammond, the Chancellor of the Iowa State University. It is evident that Blackstone's analysis is related to his subject, which is the laws of England, and so related that any apprentice may easily comprehend it. While not the most logical, Blackstone's arrangement serves for the familiar exposition of the laws of England. An analytical division of a more logical kind would not be better adapted to the concrete purposes of technical law. Kent deviates somewhat from Blackstone, in his arrangement of the common laws in force in America of the early eighteenth century. But Kent's arrangement also deviates from scientific standards. Both Blackstone and Kent ignore philosophical disquisitions. Their sciences of the common law assume or postulate such elements, as right, justice, sanction, or coercion, leaving the theoretical exposition or critical analysis to the legal philosophers. It is true that Blackstone prefaces his Commentaries with an irrelevant and very inadequate or slight discussion of what he calls the "law of nature" and the "law of revelation," but he very soon reaches *terra firma* when he comes to his definition of the municipal law of England, the real subject of his great work, and he never again refers to either his "law of nature" or his "law of revelation." His "law of nature" is a mere excrescence, which can be entirely omitted without the faintest prejudice to his great work. Unfortunately it enabled his detractors to obscure the extraordinary merits of his work. It was Blackstone, we should remember, who supplied the common law, for the first time, with an accurate legal terminology in the vernacular, and who first gave a lucid exposition of a highly technical and confused subject. What a distinguished service this was to the English-speaking world! It was Kent in turn who first stated authoritatively the common law in force in America and in a manner often superior to Blackstone's.

The analysis or classification of laws by Blackstone and Kent professes to be based mainly on rights. A "right," as conceived by these great common lawyers, is a power or faculty inhering in

some positive law, recognized and enforced by the government through its courts of justice. To common lawyers no other rule engenders a legal "right." Thus they avoid the sophism and equivocation so apparent in the transcendental discussions of "right" by the scientific jurists of some other countries. In this particular, as in all others, the common law shows itself to be a practical system for furthering the convenience of those subject to it. That greatest of German philosophers, Kant, admitted that the question — what is right? — is as embarrassing to the jurist as the question — what is truth? — is to the logician. But he had no reference to England or America. The common lawyer avoids all this embarrassment by his simple and perspicuous definitions of law and right. How would it aid common lawyers to hold, with Schopenhauer, that wrong is the fundamental primary concept, and that the concept of right is the mere negation of wrong? To common lawyers a science of law is a systematic presentation of the knowledge of positive laws. This science is admirably stated and expounded by Blackstone and Kent. The science of the common law as presented by those writers would be only obscured by irrelevant discussions which belong to a philosophy of law. Neither author probably made great pretensions to a profound knowledge of the philosophy of law.

Having considered the province of the science of law, let us turn next to the philosophy of law. According to English and Americans, a philosophy of law is a systematization of the conceptions furnished by the science of the common law. It is a search of first and supreme principles. Under various titles there are numerous writings in the English tongue which are entitled to be regarded as philosophies of the common law. It is unnecessary to resort to the German schools for a philosophy of the common law. All philosophies of the common law are characterized by the peculiar genius which has made the common law one of the two great legal forces of high civilization. Can anyone be so fatuous as to suppose that a people which has displayed such genius for law can at this late stage of development be destitute of a philosophy of law? To prove the contrary it is only necessary to name Hobbes and Locke, two of the brilliant company who have dealt with the philosophy of the common law. English philosophy of law has one great quality: it is animated by a high regard for

individual liberty and respect for individual property — the extension of liberty; this is conceded by the Germans to be the characteristic of the philosophies of the common law. All English and American philosophies of law pursue the objective method, and reject the subjective or metaphysical method, which attempts to frame tenable hypotheses concerning the objective order of things. What is it that the lovers of German philosophies propose to substitute for the admirable philosophies of the common law? Is it the shallow socialistic philosophy of the modern schools? That is the real question for thinking lawyers in this country.

In the development of the legal systems of highly civilized states we should remember that two nations have stood forth far in advance, the Italian Aryans and the English. It has been well said that these people only have combined the moral force and analytical acuteness indispensable for the creation of a great system of law. The peculiar gifts of the Germans, their incomparable fancy, their creative passion and scientific depth, are correctly stated to be hindrances in the formation of law, when these qualities come to be contrasted with the strictly legal and empirical attitude toward law of the Romans and the English. The impulse to build from within outwards, the unswerving love of freedom — in short, all the requisite moral qualities necessary to the creation of a system of law, — are said to have been confined to the two nations just mentioned, and not to have been shared by the Germans. It is from the English colonies we derive our common law. If England had had a reception *en bloc* of Roman law, or if the Romans had not departed forever in the fifth century of our era, the influence of England on the law of the world might have been on a level with the influence of Germany and not equaled that of Rome itself. But fortunately for this country, it was otherwise.

It is very noteworthy that neither Roman nor English legal development has been greatly influenced by philosophy. It has been stated by an eminent philosopher of law that the few passages found in the literature of Roman law, taken from Greek philosophy, have no real connection with the developments of Roman law. A few obscure observations contained in the "De Officiis," the "De Legibus, Libri Tres," and the "Librorum de Republica Sex quae Supersunt" of Cicero, and in the "Corpus Juris" of Justinian have enabled modern theoretical jurists to reconstruct what they

are pleased to term a philosophy of Roman law. The "Corpus Juris" is a splendid but imperfect fragment of Roman law, and more may have been contained in the original sources. What would we not give for the writings from which the Pandects were taken! They would reveal a Roman philosophy of law if one there was. It is certain that the virile features of Roman law were formulated with absolute independence of a critical philosophy, and before the age of the scientific jurists, who followed the end of the republic, there is no trace of a purely scientific method. Until the age of Cicero there is no adequate proof that a philosophy of law was potential in the development of Roman law. Cornelius Nepos, a contemporary of Cicero, distinctly says in the "De Historicis Latinis," "*philosophiam, ante eum, incomptam.*" If there ever was a Roman philosophy of law we may be sure that it was the production of the jurists who did not precede Cicero. It has been superbly said that before Cicero the Romans did not think; they acted. In other words philosophy was with the Romans the creature of inaction and a sign of change. In all events, that called Roman philosophy was but a weak paraphrase of the Grecian. As it was in Italy, so in England. From the age of Bracton to that great one of Bacon, Hobbes, and Locke the common law was equally destitute of a philosophy of law, if we except the "Opusculum de Natura Legis Naturae" and "De Laudibus Legum Angliae" of Fortescue, Hooker's "Ecclesiastical Polity," and the "Dialogus de Fundamentis Legum et de Conscientia" (Doctor and Student) of Saint Germain, which may be regarded as slight performances in the domain of philosophy.

German philosophy of law is necessarily affected by some accidents or conditions not observable in common-law countries. The extensive reception of Roman law in Germany has had a profound significance on German legal philosophies. The fact that a dead and long misunderstood system of law was forced upon Teutons as a dogma is regarded as a great misfortune for legal development by many Germans. This misfortune affects their philosophies. At an early day only the historical and the exegetical methods were pursued in Germany with great vigor and learning, although Jacques Cujas of Toulouse was probably the predecessor of the entire school of Germans in these methods of approach to Roman law. The historical and the exegetical

methods were not philosophical. The meditations of German jurists, their metaphysical attempts to formulate the ultimate causes of law, and their *a priori* conception that somewhere in the long past there was a certain ultimate reason which made it the duty of all men to accept it and submit to it as law, have greatly affected the science and even the administration of German law. In other words, German law has a philosophical base and German philosophy of law contains a fundamental assumption which makes them very unfit for common-law countries. To formulate rules of law on a method appropriate to ethics or general philosophy is a singular fallacy. I have denoted the radical difference between the German and the English conceptions of law. Let us next glance at the growth of a philosophy of law.

It was only with the development of international law in the sixteenth century that the modern philosophy of law begins. It was essential to international law that it should have a solid base, and this base was first sought in *jus naturae*. From this resort to a law of nature sprang the philosophy of modern law. It comes with ill grace from the would-be disciples of modern German philosophy of law to affect to despise as they do *Naturrecht*, for *Naturrecht* was a first attempt at a philosophy of law. *Naturrecht* did not differ essentially from *normal recht* of later times. Without *Naturrecht* we should have had a much more belated advance to modern philosophy of law. That *jus naturae* was a somewhat inadequate base for a philosophy of law no one now denies, but *jus naturae* served a good purpose before it went into the limbo of abandoned theorems; it led soon to *a priori* discussions of the nature of man.

Wolff may be regarded as the first German to base philosophy on *a priori* principles. In Germany a rationalistic or *a priori* philosophy, based upon pure reason, long ran its brilliant course; but at present it is no longer, I believe, influential even in Germany. As applied to law it is in the course of being replaced by a new inductive and empirical philosophy, which I shall venture to speak of later. The new philosophy has close relations to anthropology and psychology on the one hand and to practical politics on the other. The various and variant rationalistic or *a priori* German schools of philosophy demand respect. Whatever their defects or limitations, their genius is extraordinary and they were worthy of the

greatness of the German nation. Yet they are sometimes asserted by philosophers to have been founded on a defective psychology and a false metaphysic. But philosophers have one thing in common: they rarely agree. We cannot however forget that it was Hegel, the last of the great rationalists, who maintained that through law a human being attains the dignity of a person whose attribute is expressed by property. This one thought redeems much of Hegel's extravagance.

An *a priori* philosophy is only valuable to common lawyers when its data or presuppositions are verifiable, its postulates unquestioned; and this is rarely, too rarely, the case. This fact is the basis of the dissatisfaction in Germany with the older philosophies, although full of noble thought and elevated sentiment. That which ought to be exact is of all disciplines the most inexact. Many moderns are in consequence dissatisfied with the older German philosophies of law, but I have never seen the debt which their dissatisfaction owes to the English philosophical school admitted. They have always the reserve of a strong people when it comes to foreign influence.

The new German philosophies of law are critical studies of law, ethics, politics, economics, biology, and that science which deals with social man and is now awkwardly termed "sociology." These are all new sciences and their boundaries or contents are at present indeterminate. Biology did not become a science until the end of the eighteenth century. Sociology has not yet become a science, as historical events are not yet reduced to orderly sequence. This being so, a philosophy of law which attempts to embrace all these sciences is necessarily incomplete if not defective. The philosophic synthesis of incomplete sciences is likely to prove extremely faulty.

To what science does the law of the lawyers belong? Common lawyers deny that the making of new law is a part of the science of law, and they assert that it belongs to some other science: whether it be called legislation, politics, political science, or the science of government, is immaterial. Bentham stated that a philosophy of the conformity of law to the principles of justice belongs to the science of legislation. The German Holtzendorf, in "Die Principien der Politik," said that the science of politics is not occupied with the administration of justice, which belongs to

the science of law. But it was Savigny who finally admitted that the German language was not juridically formed. If Savigny was accurate in this statement, German is unfitted for a philosophy of law, and modern German treatises would be benefited by a recurrence to the Latin of the schools. All these things are to be considered before the primacy of any German philosophy of law can be conceded by common lawyers. The new socialistic philosophy of law repudiates the proposition that the making or formulation of law is foreign to the science of law, and as law is developed in Germany they may be right. But that they are wrong when their philosophy is applied to the science of law in English-speaking countries is a proposition already made evident.

At present in Germany there are innumerable philosophical writers on law who desire to reconstruct the science of law on the exclusive basis of modern economic life. Modern economic life they would also reconstruct on a new foundation. This creates a new philosophy of law which is revolutionary. But the conditions in Germany must be taken into account when we consider the effect of the new philosophy on the political life of that country. In most continental countries of Europe the development of law is conceived to be the function of trained jurists and not the function of untrained legislative bodies. In them the professorial vocation is confined to legal theory. The innumerable professorial writers on the philosophy of law are not, however, taken seriously in Germany, where Prussia practically controls the empire. Much of the theoretical philosophy of the provincial professors is ignored by the governing classes in Prussia, where conservative forces are in firm and stable control of the State, notwithstanding many of the new philosophies are inconsistent with the continued existence of the Empire. So long as the teachings of the new philosophies are not attempted to be put in practice, they are treated in Prussia as innocuous. Were it to become necessary, their practical applications, doubtless, would be strongly repressed by a stable and intelligent government. As it is, the revolutionary philosophies are treated by the State as a harmless product of an introspective band of scholars of no particular influence for evil and of no great account in the serious affairs of a government and a law, left to trained jurisconsults and bureaucrats.

It is in a country where institutions are less stable and higher

forms of education less general than in Germany and England that the revolutionary doctrines of the theoretical expositors of law are more apt to take root and to spread their pernicious influences among incompetent or shallow thinkers. Thus it is that the modern German philosophies of law are likely to become dangerous to the institutions of this country while perfectly harmless in Germany as now constituted. This is the serious side of the Germanomania of some American professors of law, educated in Germany or imbued with German thought and theory. Society can never be reorganized by a philosophy. The difference between the attitude of Englishmen and Americans educated in Germany to German philosophies is very marked. The Englishman never forgets that he belongs to an older and more stable empire of thought, while the American at once succumbs and swallows the whole German feast. Whether it is that Americans are apt to regard our legal institutions as plastic, I do not know, but I do know that the result is not satisfactory to those who regard our common-law institutions and our constitutional government as even more stable than those of England in the present flux.

The older German philosophies of law were based upon such metaphysical conceptions as "final cause," "freedom of the will," or on *a priori* doctrines of inherent rights. Debatable as many of the principles announced by the rationalists may have been, there was little in the older philosophies of law which was mischievous when reduced to practice, if this were possible. But the new philosophies are both subversive and destructive in tendency. If one take up a modern German treatise on the science of law, the statement will generally be found, "that the origin and maintenance of law would not be possible without freedom of will." Yet modern psychology, I believe, does not even recognize the existence of the will as it is concerned only with the process of the will or volition. But be this as it may, it naturally suggests the question whether such discussions are as yet really profitable to common lawyers.

There are admirable German philosophies of law, such as Kohler's "Lehrbuch der Rechtsphilosophie," lately translated into English, and published in the "Modern Legal Philosophy Series" under the auspices of a committee of the Association of American Law Schools. But the newer German philosophies of law, based on law "with an economic content," elevate "society" above the State

and subordinate law to economic and abstract or *a priori* theories. In this they run counter to the stability and pragmatism of all our institutions. They would confuse our legislation with our administration of the law. They would turn every American judge into a legislator or legal philosopher on the lines marked out by the economic and philosophical thinkers of the socialistic schools. In other words, the new legal philosophies of law are the philosophies of socialism. Other inherent defects of these new philosophies of law are that they unduly magnify abstractions and the theorems of economics, now admitted to be a branch of ethics. Ethics and economics are more nearly related, as Bentham said, to a science of legislation or government than they are to the science of law. A philosophy of law which fails to perceive clearly this distinction tends to debase the administration of justice as applied for centuries in English-speaking countries. The new political theory of "social justice," which would turn every common-law judge into a philosopher of law, and have him disregard the law of the land for some vague conception of social economic justice, springs directly from the confusion of thought apparent in the new philosophies of law. The first principle of American government is the stability of law formulated on constitutional lines. The principles of the new philosophy would first destroy our American constitutions, and then reorganize our American governments according to the economic theories of the socialistic party.

But the greatest defect of the new philosophy of law is its assumption that economics and sociology are exact sciences. This cannot yet be conceded. A very long road is still to be traveled before the theorems and the deductions of either economics or sociology can be exact enough for the hand of a philosopher of law. Most of the American disciples of the new philosophy bestow no attention on the limitations and defects of the very system they are advocating. In discussing the new philosophies, they evince no trace of originality or independence of thought. If they indulge in any discussion whatever, it is a mere logomachy, and not a discussion of principle. When our American friends style each other "Neo-Kantian" and "Neo-Hegelian" it sounds imposing, but it cannot conceal a marked poverty of thought. An American "Neo-Kantian" suggests the story of the child who said its companion was a botanist because he liked the odor of flowers.

In conclusion, it is to be hoped that our lawyers will bring their critical faculty to bear when they approach the new German philosophies of law proposed for our acceptance. Let them realize that their own law is the result of an independent experience of a thousand years, that it is the law of the freest and most enlightened governments which the world has ever seen, and remembering this they will not reject their own law for a law made pursuant to a foreign system of philosophy, at war with American institutions. The greatest contribution of American thought to the philosophy of the world is that known as Pragmatism. It is highly probable that the great American philosophy of law will grow out of a modified pragmatism. In making this last tentative statement, I am not unmindful that the old Aristotelian or Scholastic philosophy is to our great advantage both explicit and implicit in the original of our common law and particularly immanent in that branch of it administered in the Court over which I have the honor to preside.

Robert Ludlow Fowler.

NEW YORK CITY.

NOTE. — The platform of those teachers of law who do not subscribe to the once orthodox Anglo-American faith in the all-sufficiency of analytical and historical jurisprudence is set forth by Professor Wigmore in these words:

"Last, and most of all, the Wish would be to see this subject studied with an unremitting outlook for its Philosophy. Every institute and principle of law has a philosophy, — as every object in the sunlight has its attendant inseparable shadow. In the quest for the rule we must insist on including its reasons, and on lifting them out into the open. That human death may or may not be the subject of an action, — that truth is or is not a defense for the libeller, — that a judge is privileged absolutely or only qualifiedly, — that a secondary boycott is or is not justifiable, — all these rules and principles rest on reasons of some sort. They may be reasons of ethics, or of politics, or of economics, or perhaps of public health, or of a dozen other sorts. They may be found in experience or in dogma. But they are given to us independently of the rule of law itself. The rule of law is to be tested by the philosophy of the subject. In these days, when a restatement of the entire body of our law is impending, we must be students of reasons as well as of rules. And the conservative needs this quite as much as the reformer. He who is not ready to give reasons for the faith that is in him can not expect to hold his own against the demagogue and the crude innovator." [1]

Again he says:

"A rule of law — and especially any rule of General Rights — is a rule of life. It is founded on the dogmas and experiences of life; and life's dogmas and experiences are recorded in a vastly wider library than the covers of law-books comprise. Take, for instance, the law of arrest on suspicion. There, in the law-books, is the rule; but is all the philosophy of it there? Are not the histories full of the political convulsions that have attended that procedure? Is not the rule itself little more than the title-page to many long chapters of intense controversy and keen philosophizing? And to-day, in estimating the respect due to the rule, can it be studied without consulting

[1] Cases on Torts, preface pages, viii–ix.

those chapters of lay literature? Take again the very pressing problem of the boycott and the strike. Can their rules of law ever be consistently formulated without a philosophy which takes into account, not merely the ethics of human struggle, but also the postulates of economic science as to industrial competition? And there are scores of like instances." [2]

Critics had not been wanting who accused the law schools of undue narrowness, and one as late as 1907 proposed that the candidate for admission to the bar should be required to study "natural and civil law and the principles, foundations and spirit of law" by reading Burlamaqui's Natural Law, Pufendorf and "judicious selections from Savigny, Pothier, Domat, Grotius and D'Aguesseau." [3] It seemed to the Association of American Law Schools something of a reproach that seventeenth- and eighteenth-century works were still standing in this country for expositions of "the principles, foundations and spirit of law" and that translation of modern treatises which dealt with these subjects might be a service. To Judge Fowler, however, the project of the Association appears to be an attempt to subject America to the "modern philosophy of the German socialists!"

In another paper dealing largely with the same subject,[4] Judge Fowler tells us that American common law "needs no assistance from without." If so, our law has lost a power of absorption of ideas from without which has been one of its marked characteristics in the past. Hitherto it has been no bar to the reception of ideas into our law that they were modern or that they came clothed in a foreign tongue. Wilson, Marshall, Kent, and Story made the Continental philosophy of law of the eighteenth century the staple of our juristic thinking. Later Francis Lieber introduced the German philosophical jurisprudence of the first half of the nineteenth century. Still later James C. Carter used the German historical jurisprudence of the last half of the nineteenth century to put down the codifiers. All these elements so introduced from without demonstrably entered into and helped form the modes of thought which we call the common law of America. Hence when Professor Wigmore, for example, suggests that the new stage of Continental thought represented by the social-philosophical jurists may have something for us he has abundant warrant in precedent. No one in speech or in writing at least has proposed that we subscribe offhand to every detail of the system of any philosopher, German or otherwise. What is urged is that now as in the past we look to what the leaders in the philosophical thought of to-day are thinking and saying and ask ourselves what use we may make of it. The juristic Podsnappery which sees danger in any contact of common law with modern Continental philosophy is wholly out of line with the best traditions of American legal science.

Of the three objections, namely, that the dangerous philosophy to which this country is about to be subjected is modern, is German, and is socialistic, the latter is evidently the one about which Judge Fowler is chiefly concerned. Apparently, however, he uses "socialist" and "socialism" rather as epithets than as terms of precise import. For no American teacher of law has followed Menger, or the socialist jurists of whom he was the leader. As to the social-philosophical and sociological jurists, some of whose writings have been expounded to American readers, to class them with Menger suggests the ward

[2] Cases on Torts, preface pages, ix.
[3] Dos Passos, The American Lawyer, 168.
[4] The Future of the Common Law, 13 COL. L. REV. 595, 603.

politician who explained to the newly naturalized Frenchman "The Republic, the Republicans, it is the same thing." Perhaps to one who can seriously assert in print that Stammler is the chief exponent of a sociological jurisprudence whose main dogma is that "legal science ought to be founded upon generalizations from a descriptive sociology,"[5] the difference between social-philosophical, sociological, and socialist are as negligible as the difference between Herbert Spencer and Rudolf Stammler.

Judge Fowler makes six points against any reception of modern German philosophy of law in this country. The first is that law is one thing in Germany and another in a country subject to the common law, in that in the latter there is always a rule of positive law at hand for the judge who, therefore, merely applies and never creates, whereas in Germany the distinction between legislation and juristic application is not kept clear. According to the common-law view, he tells us, the science of law and the science of legislation are wholly distinct, whereas the philosophers would confuse legislation with the administration of law. The orthodox fiction that a rule of the common law is always at hand potentially to meet every case and that the judge does no more than discover it by logical process and apply it had broken down without any assistance from Germany. Austin long ago called it a childish fiction. Professor Gray, whom no one would accuse of any taint of sociological jurisprudence, had asserted boldly that tradition and legislation furnished simply raw materials which were made into law by the courts. Indeed this doctrine came into France and Germany from England, not into English-speaking countries from Continental Europe. It is true, English analytical jurists have uniformly insisted upon the fundamental distinction between the science of law and the science of legislation. This, however, was only a part of the general tendency to excessive specialization in the nineteenth century and abandonment of that narrow view of legal science is a part of the general movement to give up the watertight-compartment theory of learning which has been going on upon every hand. Indeed the movement for unification of the social sciences came from this country, and it might reassure Judge Fowler to remind him that abroad sociology has been known as the American science.

The second point made is that for the common-law lawyer a right is something resting upon positive law and hence we need not trouble ourselves with the interests which such legal rights secure or the ethical or philosophical problems which are involved in securing them. As to this, it should be remarked that common-law judges have always concerned themselves with these questions. As Judge Dillon has said, "Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live."[6] In periods in which the law is stable, as in the last half of the nineteenth century, philosophy is not of great moment. But in periods in which the law is formative or is growing, it has always grown under the influence of philosophical ideals. It is of great consequence, therefore, in such periods that juristic and judicial thinking be in touch with the best lay thought of the time. Such was the case in the classical period of American law in the past, and there is no reason to suppose that a straitjacket can be imposed upon our juristic thought in the period of growth upon which we have entered.

[5] Fowler, The Future of the Common Law, 13 COL. L. REV. 595, 605.
[6] Laws and Jurisprudence of England and America, 18.

The third point is that neither Roman nor English legal development has been greatly influenced by philosophy. In the reaction from the metaphysical philosophy of law of the nineteenth century such statements were frequently made. And yet it is a commonplace of the books that the classical Roman law was largely shaped by Greek philosophy. The contact of lawyer and philosopher in a period of growth resulted in liberalization of the law exactly as happened afterward in Continental Europe in the seventeenth and eighteenth centuries. As the vouching of German writers for this proposition might be objected to, it may suffice to cite the leader of English students of the Roman law, Mr. Buckland of the University of Cambridge. He says, "If the primitive Roman law may fairly be called Græco-Roman as being filled with ideas either derived from or held in common with the Greek tribes . . . it may be with no less justice applied to the classical Roman law itself. Not merely were the jurists soaked in Greek philosophy, but that law was in the main the work of men of Greek or at least Oriental origin." [7] As to our own law, one needs only to look at the law lectures of James Wilson, framer of the Constitution, professor of law in the University of Pennsylvania, Justice of the Supreme Court of the United States, at the portion of Kent's Commentaries dealing with public law, or at Story on the Constitution, to perceive how thoroughly our notions of the relation of individual and state, of the law as a system of securing individual interests, of the duty of courts with respect to legislation which infringes natural rights, and our turning of the co mmon-law rights of Englishmen into the natural rights of men are the result of contact with the French and Dutch publicists.

The fourth point made is that the new philosophy of law assumes that economics and sociology are exact sciences. I know of no modern writer on philosophical jurisprudence who makes such an assumption. Nineteenth-century economics might be amenable to such a charge. As to the philosophical jurisprudence of to-day, it would be more correct to say that it doubts whether even the nineteenth-century Anglo-American jurisprudence is the exact science which its votaries have taken it to be.

Fifth, the point is made that the social-philosophical jurisprudence is not taken seriously at home where "the theoretical philosophizing of the provincial professors (!) is ignored by the governing classes of Prussia." In other words, Judge Fowler conceives that the social-philosophical jurisprudence, a harmless toy at home where the War Lord and the Prussian bureaucrat see to it that no harm comes to the commonweal, is a most dangerous toy abroad where the American law-teacher, with no originality and no independence of thought, is not held in check by a benevolent despot or a beneficent administrative oligarchy. Possibly he would say that, on the one hand, Austria, where perhaps the foremost representative of sociological jurisprudence lives and teaches, is preserved by the Catholic monarchy and that, on the other hand, France, where not only sociological jurists, but socialist jurists may be found in plenty without check, is on the road to political and juristic perdition.

Finally, we are told that the American philosophy of law will be pragmatism. This is not at all a new proposition. I suggested it some years ago in a paper entitled "Mechanical Jurisprudence." [8] Moreover, I have twice

[7] Buckland, Equity in Roman Law, 135.

[8] 8 COL. L. REV. 605. See also my paper, The Scope and Purpose of Sociological Jurisprudence, 25 HARV. L. REV. 489, 516.

endeavored to sketch a juristic treatment of interests (natural rights) from the pragmatist standpoint.[9] But some of our most promising American students of the philosophy of law are to be found in the camp of the neo-realists, and there seems no reason to suppose that it would be possible or desirable to have all American jurists in the same philosophical camp.

Specifically, Judge Fowler fears two ill results. (1) First he fears that the administration of justice as carried on for centuries in English-speaking countries will be debased in that every common-law judge will be turned into a philosopher of law and so "disregard the law of the land for some vague conception of social economic justice." When contact with the philosophical views of the eighteenth century led English courts in dealing with mercantile questions and in bringing about the absorption of the law merchant into the common law to make what then seemed startling innovations, there were many who were persuaded that the law of the land was lost. Even Thomas Jefferson advocated receiving English law as of the first year of the reign of George III so as "to get rid of Mansfield's innovations."[10] But philosophy has played its part also in periods of stability, as may be shown, for example, by the decisions of the New York Court of Appeals on the subject of liberty of contract which proceeded upon the proposition that that government governs best which governs least and treated due process of law as declaratory of Spencer's Social Statics.[11] The stability of our Anglo-American judicial tradition is threatened not by philosophers, but by circumstances which, as so often in the past, require to some extent a juristic new start and have brought upon us, whether we will or not, a period of growth comparable to the rise of the court of equity in the sixteenth and seventeenth centuries.

(2) Second, he fears that the new philosophy of law, being a philosophy of socialism, will destroy our constitutions and subvert American legal institutions of which constitutions are the pillars. As to this, perhaps it is enough to say that eminent representatives of the social-philosophical school in Germany, whose writings are much cited by American law-teachers, are so far from being socialists that one of them makes a vigorous philosophical argument for the German monarchy.[12] When some ten years ago American law-teachers were so bold as to challenge the state of American procedure and to urge a study of English organization of courts and English procedure, we were told that they were making "drastic attacks upon the American judiciary," and that nothing but ill could result. To-day the profession at large is saying all that they said and more. It may be suspected that ten years hence most of what is dubbed socialism because it is a bit unfamiliar to those steeped in the Anglo-American law reports will appear quite commonplace.

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[9] Legislation as a Social Function, Proc. of the Amer. Sociological Soc., VII, 148, 155; The Philosophy of Law in America, Archiv für Rechts- und Wirthschaftsphilosophie, VII, 385, 397.

[10] Tyler, Letters and Times of the Tylers, I, 265.

[11] See the opinion of O'Brien, J., in People *v.* Coler, 166 N. Y. 1, 14; also the classical statement of Mr. Justice Holmes in the dissenting opinion in Lochner *v.* N. Y., 198 U. S. 45, 75.

[12] Kohler, Lehrbuch der Rechtsphilosophie, § 24.